IN THE SUPREME COURT OF MISSOURI

Supreme Court No. 95658

BISHOP & ASSOCIATES, L.L.C.,
Plaintiff-Appellant,

vs.

AMEREN CORPORATION, et al.,
Defendants-Respondents.

BRIEF OF THE MISSOURI BUSINESS LEGAL CENTER, ASSOCIATED INDUSTRIES OF MISSOURI, AND EDISON ELECTRIC INSTITUTE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS AMEREN CORPORATION, ET AL. FILED WITH THE CONSENT OF ALL PARTIES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

United States Constitution

Missouri Constitution

Rules

Other Authorities

CONSENT OF PARTIES

Pursuant to Mo.S.Ct. Rule 84.05(f)(2), consent has been obtained from all parties to the filing of this Amicus Curiae Brief, on behalf of the Missouri Business Legal Center ("MBLC"), Associated Industries of Missouri ("AIM"), and Edison Electric Institute ("EEI") in support of Respondents Ameren Corporation, et al.

INTERESTS OF MBLC, AIM, AND EEI IN ISSUES PRESENTED IN THIS CASE

MBLC's Mission Statement states, in relevant part, that it was formed: "To promote the fair treatment of Missouri business before courts and administrative agencies; to help educate the public on common business legal issues; to improve the business conditions of its Members related to all aspects of business organization, structure, and management. . . ."

Similarly, the mission of AIM is "to promote a favorable business climate for business, manufacturing, and industry by empowering members through communications, education, and advocacy before the legislature, administrative agencies, and the public." Many Missouri businesses, including a number of Missouri's largest businesses, are members of AIM.

EEI is the national trade association that represents all U.S. investor-owned electric utility companies, including Ameren. EEI members provide electricity services in all 50 states and the District of Columbia, serve 220 million Americans representing approximately seventy percent of all electricity retail customers in the country, and directly

employ more than 500,000 workers. Its members pride themselves on careful compliance with the laws that apply to their facilities and operations, and on good stewardship of the land and natural resources upon which they rely. To provide reliable, affordable, and sustainable electricity, EEI members also rely on an equitable and predictable business and legal framework in each state in which they operate.

MBLC, AIM, and EEI are concerned that if this Court rules, as argued by Appellant Bishop & Associates, L.L.P. ("Bishop") and amicus National Employment Lawyers' Association, that an independent contractor may assert a cause of action against a business for common law wrongful discharge in violation of public policy, or alternatively assert a cause of action for breach of the implied covenant of good faith and fair dealing if the contractor alleges it was terminated for reporting violations of law and public policy to its principal, this will: (1) fundamentally alter the contractual relationships between independent business organizations, (2) will place businesses in Missouri at a competitive disadvantage with businesses in other states (none of which provide a common law cause of action to independent contractors for wrongful discharge in violation of public policy), and (3) will discourage businesses from locating in Missouri.

ARGUMENT

I. The Contract Clauses Counsel Against Extending the Common Law Wrongful Discharge Cause of Action to Independent Contractors.

The sanctity of contract[1] is enshrined in both the U.S. and Missouri Constitutions. Article I, Section 10, of the United States Constitution provides, in relevant part, that: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . . ." Article I, Section 13, of the Missouri Constitution provides: "That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation . . . can be enacted."

These constitutional provisions generally prohibit the government from taking actions that retroactively alter the terms of a contract,[2] which is essentially what Bishop seeks here, in that it asks the Court to declare that even though the contract entered into between it and Ameren is terminable at will by either party, a common law cause of action

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[1] Missouri Courts have long recognized the sanctity of contract, for instance citing it repeatedly as the basis for the parol evidence rule. **See, e.g., *Johnson ex rel. Johnson v. JF Enter., L.L.C.***, 400 S.W.3d 763, 768-69 (Mo. banc 2013).

[2] "It long has been established that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties. ***Fletcher v. Peck***, 10 U.S. 87, 6 Cranch 87, 137-139, 3 L.Ed. 162 (1810); ***Dartmouth Coll. v. Woodward***, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819)." ***U.S. Trust Co. of New York v. New Jersey***, 431 U.S. 1, 17 (1977).

exists in favor of Bishop and against Ameren (either for wrongful termination in violation of public policy or breach of the implied covenant of good faith and fair dealing) if Ameren stopped using Bishop's service because Bishop reported alleged violations of environmental statutes and Metropolitan Sewer District ordinances to Ameren officials.

The only "contract" between Respondent Ameren Corporation and/or certain of its subsidiaries (hereinafter, collectively "Ameren") and Bishop consisted of a Purchase Order for "emergency service and/or preventative maintenance on an as-needed basis, at Ameren/UE Building Service Locations." This purchase order was issued by Ameren in late 2002 (L.F. 425-29). It was non-exclusive and did not guarantee any certain quantity of work to Bishop. In other words, Bishop did not have a contractual right to any future business from Ameren.

Bishop has admitted that it was an independent contractor, and not an employee of Ameren (L.F. 128, 1043-44, 687-88). While this Court has held that a narrow exception to the "employment at-will" doctrine exists, such that an employee has a cause of action for wrongful discharge if s/he is terminated for either refusing to engage in illegal activity or for reporting violations of the law and well-established and clearly mandated public policy, (***Fleshner v. Pepose Vision Inst., P.C.***, 304 S.W.3d 81, 92 (Mo. banc 2010)), it has also

stated that this cause of action is predicated on a direct employment relationship. ***Margiotta v. Christian Hosp. Ne. Nw.***, 315 S.W.3d 342, 346 (Mo. banc 2010).[3]

However, although Bishop was an independent contractor, not an employee, Bishop is requesting that the Court find that it has a right to pursue a common law claim for wrongful discharge in violation of public policy and/or a claim for breach of the implied covenant of good faith and fair dealing, based on allegations that Bishop reported certain environmental and ordinance violations to officials at Ameren, and that as a result Ameren decided to stop using Bishop's services. Under the terms of the purchase order, Ameren could cease using Bishop's services at any time, for any reason or for no reason at all. Bishop is thus essentially seeking to graft terms onto the agreement that would prohibit Ameren from terminating Bishop's services if it reported alleged violations of law and clearly established public policy to Ameren officials. This is exactly the kind of governmental interference that retroactively alters the terms of a contract, and that the federal and state Contract Clauses are designed to prevent.

[3] In ***Keveney v. Mo. Military Acad.***, 304 S.W.3d 98, 103 (Mo. banc 2010), this Court held that the common law wrongful discharge cause of action may be pursued by employees with written employment contract, and not just by at-will employees.

II. Every Court to Consider the Question has Refused to Extend the Common Law Wrongful Discharge Cause of Action to Independent Contractors or to Find A Breach of the Duty of Good Faith and Fair Dealing on Facts Similar to Those Alleged by Bishop.

Courts in jurisdictions throughout the United States have unanimously refused to extend the common law wrongful discharge/public policy exception to independent contractors (these cases are cited in Respondents' Substitute Brief), in large part because to do so would substantially change the contract between the principal and independent contractor. **See, e.g., *McNeill v. Sec. Ben. Life Ins. Co.***, 28 F.3d 891, 893 (8th Cir. 1994) ("Extending the employment law public policy exception to independent insurance agents, as the [Appellants] urge, would effectively nullify the termination-without-cause provision in the contract. . . ."); and ***Abrahamson v. NME Hosps., Inc.***, 241 Cal. Rptr. 396, 399 (Cal. Ct. App. 1987) ("[I]f termination without cause could only be accomplished with cause . . . the phrase 'without cause' is effectively deleted from the agreement which then is terminable only for cause. Such interpretation of the clear, unambiguous 'without cause' term in the agreement rewrites the contract,").[4]

[4] For the same reason, the Court in ***Abrahmson***, and other courts (**e.g., *New Horizons Elecs. Mktg., Inc. v. Clarion Corp. of Am.***, 561 N.E.2d 283, 286-87 (Ill. App. Ct. 1990)) have consistently refused to find that a cause of action lies for breach of the implied covenant of good faith and fair dealing based upon allegations that a principal

III. Important Differences Exist Between Independent Contractors and Employees Which Militate Against Extending the Common Law Wrongful Discharge Cause of Action to Independent Contractors.

In refusing to extend the common law cause of action for wrongful discharge in violation of public policy to independent contractors, Courts have frequently cited the distinctions between employees and independent contractors. For instance, in ***Sistare-Meyer v. Young Men's Christian Ass'n.***, 58 Cal. App. 4th 10 (Cal. Ct. App. 1977), the Court stated:

> [T]he long-standing distinction between employees and independent contractors presents important competing policy concerns. California common and statutory law distinguishes independent contractors from employees and their statuses, though both rooted in contract, are significantly different. Independent contractors typically have greater control over the way in which they carry out their work than employees, and businesses assume fewer duties with respect to independent contractors than employees. . . . Thus, the independent contractor status provides the hiring party and the worker with an alternative relationship that gives each more freedom and flexibility than the employer-employee relationship.

Id. at 16-17 (internal citations omitted).

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terminated the at-will engagement of an independent contractor for alleged reporting of a violation of law and public policy.

In ***Premier Wine & Spirits v. E. & J. Gallo Winery***, 846 F.2d 537, 540 (9th Cir. 1988), the Court held that there is a consideration that makes the cause of action for wrongful discharge in violation of public policy "peculiarly apt in that setting and not in a broader context: it is normal for an employee to take directions from his employer. In the ordinary commercial world, the control of one party's actions by another is not so usual or so close." In that case the Court refused to extend the common law wrongful discharge cause of action to the nonexclusive wholesaler of a wine producer.

Of particular note is ***Harvey v. Care Initiatives, Inc.***, 634 N.W.2d 681 (Iowa 2001). The Iowa Supreme Court noted therein that many courts have found the tort of wrongful discharge in violation of public policy is "derived from the inequity of the bargaining position in a typical at-will employer-employee relationship, and the inability of employees to otherwise obtain protection. . . ." ***Id.*** at 684. Citing ***Sistare***, the Court then held that "independent contractors do not require the same type of protection." ***Harvey,* 634 N.W.2d at 684**. The Court went on to explain that:

> They [independent contractors] have greater control and flexibility in their work and in the hiring process, and the hiring party assumes fewer responsibilities towards independent contractors than at-will employees. . . . The distinct differences in the nature of the relationship between independent contractors and at-will employees not only suggest a greater need to protect at-will employees, but existing principles of contract law provide independent contractors with remedies not available to employees. . . . Thus,

> an independent contractor can not only negotiate the circumstances governing the termination of a contract, but has contract remedies to enforce all expressed or implied terms of a contract. This diminishes the need for court-based remedies. Moreover, judicial extension of tort remedies into contracts without clear legislative authority can essentially nullify terms agreed to by the parties to the contract. We find no compelling need, as we did for at-will employees, to support a wrongful termination tort for independent contractors.

***Harvey*, 634 N.W.2d at 684.** (internal citations omitted).

Where a "hired individual retains discretion to make business decisions in the individual's independent interests rather than in the interests of the hiring party . . . [s/he] may be less needful of legal protection." Harper, Michael C., *Fashioning a General Common Law for Employment in an Age of Statutes*, 100 CORNELL.L.REV., 1281, 1298 (2015).

IV. Any Expansion of the Wrongful Discharge Cause of Action Should be Determined by Legislative Action.

Both the ***Harvey*** (see the quote above) and ***Sistare-Meyer*** courts recognized the fundamental nature of the change that would be wrought by a holding that the wrongful discharge public policy cause of action applies to independent contractors, and suggested that any such change in the law should be left to legislative action. In ***Sistare-Meyer***, after referring to "public policy" as "an unruly horse, astride of which you are carried into

unknown and uncertain paths," the Court then stated that "public policy as a concept is notoriously resistant to precise definition, and . . . courts should venture into this area, if at all, with great care and due deference to the judgment of the legislative branch lest they mistake their own predilections for public policy which deserves recognition at law." ***Sistare-Meyer***, 58 Cal. App. 4th at 16 (internal quotations and citations omitted).

While the amicus brief filed by the National Employment Lawyer's Association ("NELA") cites to various statutes that apply "whistleblower protection" to independent contractors as well as employees, the extension of these protections to independent contractors has been accomplished by legislative action, not judicial decision. Of perhaps even greater significance is that both Congress and the General Assembly have frequently refused to extend the same protection against discrimination and retaliation to independent contractors that exist for employees. For instance, the protections of federal discrimination laws, including Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act do not extend to independent contractors. ***Wilde v. County of Kandiyohi***, 15 F.3d 103, 104 (8th Cir. 1994) ("Title VII protects workers who are "employees," but does not protect independent contractors."). **Accord, *Glascock v. Linn County Emergency Med., P.C.,*** 698 F.3d 695, 698 (8th Cir. 2012). ***Alexander v. Avera St. Luke's Hosp.***, 768 F.3d 756, 761 (8th Cir. 2014) (The ADA and ADEA do not provide protection to independent contractors). This Court has held that the Missouri Human Rights Act does not protect independent contractors. ***Howard v. City of Kansas City***, 332 S.W.3d 772, 779-84 (Mo. banc 2011).

The question of whether the cause of action for wrongful discharge in violation of public policy is to be extended to independent contractors is one that should be determined by legislative action, and not this Court.

V. There is No Workable Rule or Test to Determine Which Independent Contractors Should be Allowed to Assert a Common Law Cause of Action for Wrongful Termination.

In ***Howard***, this Court set forth a test for determining whether a worker is an independent contractor or an employee in the context of a claim under the Missouri Human Rights Act, based upon what some have termed an "entrepreneurial" test. This test might also be useful to determine who is an employee for purposes of asserting a common law claim of wrongful discharge in violation of public policy. However, that test is not relevant here because Bishop concedes (and the facts clearly show) that it was an independent contractor of Ameren. Even though Bishop concedes that it was acting as an independent contractor, it nevertheless tries to have it both ways, by arguing that given the particular circumstances obtaining between it and Ameren, it should be permitted to pursue a cause of action against Ameren (implying that whether an independent contractor could pursue a cause of action for a wrongful discharge in violation of public policy should depend on the nature of the relationship between the contractor and his principal). However, nowhere

does Bishop explain, or even explore, what factors a court should rely upon to determine whether an independent contractor would be allowed to pursue such a cause of action.[5]

In fact, any such test would be unworkable, as independent contractors come in all shapes and sizes, and the relationships between contractors and principals are almost as varied as the stars in the sky. Yes, there are a number of small independent contractors plying the trades, such as Bishop, but trade contractors can also be quite large and sophisticated businesses.

Further, independent contractors exist in virtually every realm of our economy. "Independent contractors were more likely than those with traditional [employment] arrangements to be in management, business, and financial operations occupations; sales and related occupations; and construction and extraction operations." Bureau of Labor Statistics News Release Dated July 27, 2005, Concerning Contingent and Alternative Employment Arrangements Survey, February 2005. **See also: Katz, Lawrence, F., & Krueger, Alan B. (2016).** ***The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015*****. Retrieved from_http://krueger.princeton.edu/sites/default/files/akrueger/files/katz_krueger_cws_-_march_29_20165.pdf.** Table 3 from this report is attached as page A1 of the Appendix to this Brief. It shows that large numbers of

[5] In contrast to Bishop's position, NELA apparently argues in its amicus Brief that the common law cause of action for wrongful discharge in violation of public policy should be available to all independent contractors. However, for the reasons explained below, this would be inequitable and bad public policy.

workers in alternative work arrangements, including independent contractors, work in industries such as: financial activities, professional and business services, education and health services, leisure and hospitality, public administration, and management; and are engaged in occupations including: management, business and financial operations, computer and mathematical, architecture and engineering, legal, arts, design, entertainment, sports and media, healthcare practitioners, and sales.[6]

[6] "Self-employed folks and independent contractors are pretty happy with their situation overall. . . . They've often chosen to run their own businesses because they love the freedom and independence. . . . Asked if they would prefer a different type of employment, only 7.5% of self-employed people and 9.4% of independent contractors said yes." Pofeldt, Elaine, *Shocker: 40% of Workers Now Have Contingent Jobs, Says U.S. Government*, FORBES, May 25, 2015, http://www.forbes.com/sites/elainepofeldt/2015/05/25/shocker-40-of-workers-now-have-contingent-jobs-says-u-s-government/#6a036cbf2532, reporting on the April 2015 GAO report Contingent Workforce: Size, Characteristics, Earnings and Benefits, (April 20, 2015), http://www.gao.gov/products/GAO-15-168R.

VI. Independent Contractors Have Different Incentives Than Employees Which Would Make Extension of the Common Law Wrongful Discharge Cause of Action to Independent Contractors Inequitable and Bad Public Policy.

Independent contractors include accountants, lawyers, business consultants (e.g., Anderson and IBM), and programmers and various types of computer technicians, amongst many others. It is not uncommon for independent contractors in these service areas to be much larger than the principals with whom they consult. These large independent contractors certainly do not need the type of protection afforded to employees by allowing them to sue for wrongful discharge in violation of public policy. In fact, if there is any imbalance in power between these types of contractors and their principals, it is often in favor of the independent contractor. Allowing such independent contractors to potentially threaten to sue for wrongful discharge in breach of public policy would only further tip the scales in favor of these independent contractors.

Additionally, homeowners frequently hire independent trade contractors of various sizes to perform work on their homes. Again, in these situations, the "power balance" often favors the contractor, while in the employment situation this balance generally tilts in favor of the employer. Furthermore, these trades people generally have superior knowledge regarding building, electrical, plumbing and mechanical codes, which will often place the homeowner at a distinct disadvantage if a trades person is alleging that a condition of the home violates code or other legal requirements. To add to this the possibility that a trades

person could threaten to sue if the homeowner refuses to contract him/her to repair an allegedly dangerous and illegal condition would only further this imbalance.

In fact, at least several courts have refused to extend the common law wrongful discharge in violation of public policy cause of action to independent contractors to avoid this very type of mischief. In ***Harris v. Atl. Richfield Co.***, the California Court of Appeal stated that the extension of a wrongful discharge tort to commercial contracts risks "turning every breach of contract dispute into a punitive damage claim." 14 Cal. App. 4th 70, 81 (Cal. Ct. App. 1993). Extending such claims to independent contractors would rewrite contracts by imposing obligations on parties that were not only not agreed to by the parties, but were never contemplated by them. The Missouri Court of Appeals, Eastern District, in its opinion in this matter, prior to transfer, cogently noted that:

> The threat of a wrongful discharge cause of action would give unscrupulous independent contracts a uniquely exploitative tool for expanding the scope of work by pointing out additional real or purported public-policy 'violations' and then threatening to report the alleged violation unless the owner agrees to authorize the contractor to fix it.

Court of Appeals Opinion at 7.

Given the different economic incentives of an employee versus an independent contractor, this is not simply an idle concern. If an independent contractor can convince its principal to give it more work, the independent contractor's profits will increase (assuming the independent contractor is economically efficient). The same is not true of an employee

who points out the need for additional work. As argued by Ameren in its Substitute Brief, this is exactly what Bishop tried to do here. While most independent contractors are unlikely to act in such a manner, this Court should not place such a powerful tool in the hands of unscrupulous contractors.

VII. Extending the Common Law Wrongful Discharge Cause of Action to Independent Contractors Will Negatively Impact Missouri's Business Environment.

Finally, AIM and MBLC are concerned about the negative economic impact on this state if Missouri is the only state to recognize a common law cause of action for wrongful termination in violation of public policy in favor of independent contractors. Faced with the potential that they might be sued by an independent contractor on such a basis if they do not agree to allow such contractor to perform all services the contractor suggests, businesses are less likely to locate in Missouri, and instead locate in another state where such a cause of action is not recognized. Further, businesses already located in Missouri may choose to move to a state where the cause of action for wrongful discharge does not extend to independent contractors. This is particularly true as independent contracting relationships have become more ubiquitous in business (see Appendix page A1).

CONCLUSION

For all of the foregoing reasons, AIM, MBLC, and EEI respectfully request that this Court affirm the summary judgment granted by the trial court in favor of Ameren.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). The entire Brief contains 4,327 words.

/s/ David R. Bohm

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of this Brief was filed electronically with the Court on this first day of September, 2016, and served by operation of the Missouri E-Filing System upon each attorney of record.

/s/ David R. Bohm